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ogc-813

OGC Has Reviewed

Chief, Services Division

15 February 1950

Legal Staff

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Proposed Lease for Space in

1. We have some doubts about the propriety of certain wording in paragraph 5 of the proposed lease. It states that "this lease will be renewed from year to year, *** and *** notice will be given in writing to the lessor at least 30 days before this lease or any renewal thereof would otherwise expire; provided, that no renewal thereof shall extend the period of occupancy of the premises beyond the 30th day of June 1954. The continuation of this lease beginning with the fiscal year commencing on 1 July 1950, and each fiscal year thereafter through June 30, 1954, is subject to appropriations of funds by the Congress to the Central Intelligence Agency or its successor if any." In lieu of the standard terminology of the form, the word "will" has first been inserted in place of the words "may, at the option of the Government," then secondly, following the word "notice" after deletion of the word "provided." The substitution conveys the impression that renewal is automatic, and although it goes on to state that it is subject to appropriation of funds, it is not in the form of a conditional proviso, and a separate sentence somewhat deceptively appears to be gratuitous.

2. It is well established, as the Comptroller General indicated in his opinion in 19 Comp. Gen. 758 that (in syllabus) "a lease executed by or on behalf of the United States for a term of years, in the absence of specific statutory authority therefor, is binding upon the United States only to the end of the fiscal year for which the appropriation involved was available at the beginning of the term with an option in the Government of renewal from year to year until the end of the term." Further, as he states in his opinion in 24 Comp. Gen. 195, 196:

"Section 3732, Revised Statutes, 41 U.S.C. 11, provides, in material part, that:

"No contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment * * *."

"Section 3679, Revised Statutes, as amended, 31 U.S.C. 665, provides, so far as here material, as follows:

"No executive department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless

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such contract or obligation is authorized by law. * * * "

3. A much cited case is *Leiter v U.S.* (1926), 271 U.S. 204, 70 L. Ed. 906, 59 Ct. Cl. 907, in which the Supreme Court indicated that not only must the appropriation be available, but the Government must also take some affirmative action to renew the lease.

4. A further provision in regard to real estate in the District of Columbia is found in Title 40, U.S.C.A. Section 34, which provides that "No contract shall be made for the rent of any building, or part of any building, to be used for the purposes of the Government in the District of Columbia, until an appropriation therefor shall have been made in terms by Congress, and this clause shall be regarded as notice to all contractors or lessors of any such building or any part of building."

5. This office does not believe that the proposed wording would be effective to the extent that it would provide the lessor with an acceptable claim for rent in any year in which an appropriation was not available for payment of the rent. Its very ineffectiveness would probably provide an adequate defense for a contracting officer otherwise liable to the penalties provided in R.S. Section 3679 (Title 31, U.S.C.A. Section 665) cited above. Since the intended language may be delusive, it is considered inappropriate, if not improper, to use it.

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cc: Subject
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